Local One, International Union of Elevator Constructors of New York and New Jersey *and* National Elevator Industry, Inc. Case 29–CB–11649

August 11, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND ACOSTA

On April 16, 2002, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief, a motion to strike unsupported exceptions, a cross-exception, and responses to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Local One, International Union of Elevator Constructors of New York and New Jersey, its officers, agents, and representatives, shall take the action set forth in the Order.

Haydee Rosario, Esq., of Brooklyn, New York, for the General Counsel.

Richard Markowitz, Esq. (Markowitz & Richman, Esqs.), of Philadelphia, Pennsylvania, for the Respondent.

Timothy Copeland, Esq. (Downs Rachlin & Martin PLLC), of Brattleboro, Vermont, for the Charging Party.

[1] The Charging Party's motion to strike the Respondent's exceptions that fail to cite supporting record evidence is denied because those exceptions substantially conform with the requirements of Sec. 102.46(b)(1) of the Board's Rules and Regulations.

[2] The Respondent and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has excepted to the judge's finding that McVicker was a 2(11) supervisor. In adopting the judge's decision, we need not rely on his supervisory findings inasmuch as we agree that McVicker was an 8(b)(1)(B) representative. See *NLRB v. Electrical Workers Local 340*, 481 U.S. 573, 584 (1987).

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based upon a charge filed on July 10, 2001 by the National Elevator Industry, Inc. (Association), a complaint was issued on September 26, 2001 against Local One, International Union of Elevator Constructors of New York and New Jersey (Respondent).

The complaint alleges that Respondent imposed a monetary fine against Peter McVicker, (McVicker) a supervisor, because he refused Respondent's demand that Kone, Inc., his employer (Employer) utilize additional employees to unload an escalator truss at a Secaucus, New Jersey project, and because of McVicker's decision to unload the escalator truss without Respondent's consent.[1] The complaint alleges that by such conduct Respondent violated Section 8(b)(1)(B) of the Act.

Respondent's answer denied the material allegations of the complaint and on December 12, 2001, a hearing was held before me in Brooklyn, New York.

Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by all parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Kone, Inc. (Employer), a New York corporation having an office and place of business at 47-36 36th Street, Long Island City, New York, has been engaged in the installation, construction and modernization of elevators and escalators throughout the United States. During the past year, the Employer purchased and received at its Long Island City facility, goods and materials valued in excess of $50,000 directly from suppliers located outside New York State. The Respondent admits, and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The Respondent also admits that it is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Employer is a member of the Association which has a collective-bargaining agreement with the Union. The Union represents elevator and escalator mechanics and apprentices.

McVicker, an employee of Kone and a member of the Union, has been employed for 20 years as a mechanic and a mechanic in charge for the Employer and its predecessor, Curtis Elevator.

In June, 2000, McVicker was assigned to "run" a job at the Secaucus Transfer Station. The project consisted of the installation of 31 escalators for Amtrak. McVicker's supervisors were Jeffrey Jenkins, the vice president of the Employer who assigned him to this job and to whom he reported, and William Custer, the Employer's construction superintendent. Neither Jenkins nor Custer had an office at the Secaucus site. During

[1] All references herein to McVicker shall be to Peter McVicker unless otherwise stated.

the period of time involved herein, June through October, 2000, Custer visited the Secaucus jobsite one or two times. At the time, he was in charge of several escalator construction sites throughout New York, New Jersey and Washington, D.C. Custer's primary responsibility is to ensure that the jobs are done on schedule and in accordance with the contract.

McVicker worked alone or occasionally with an apprentice at the Secaucus job site from June, 2000 to October, 2000. During that four month period, McVicker organized the job site including creating specific work plans for the unloading of the escalators, and ordered equipment and material to perform that job. This work was necessary in order to comply with Amtrak's requirements that each escalator to be unloaded be described in a drawing and in a written proposal setting forth the means of unloading and insertion into the building, the type of equipment to be used, the location of the crane which unloads the escalator from the truck, the entry point of the truck and which site roads will be used, and the hours of work. The proposal must be signed by a professional engineer and submitted to Amtrak for its approval. McVicker prepared the proposal alone without consulting with anyone else, and submitted it to an engineer. While working at the site, McVicker always had an apprentice assigned to him. He decided when the apprentice was needed at the worksite, and at other times, when he was not needed, he told the apprentice to remain at the shop.

The equipment McVicker ordered was usually set forth specifically in the site specific work plans, such as safety equipment and the type and length of cables and equipment needed to bring the escalators into the building. In ordering such equipment, McVicker followed the OSHA and Amtrak safety guidelines.

McVicker also decided upon the dates that the escalators would be delivered, he set up the construction trailers and containers which held the equipment to be used for the erection of the escalators, and arranged for the installation of telephone and electricity lines. McVicker also attended weekly job meetings at which he represented the Employer. The purpose of the meetings was to discuss the progress of the job. The participants included other mechanics in charge or foremen. Neither Custer nor Jenkins attended those meetings, except during the incident described below.

B. Work at the Secaucus Jobsite

In early October, 2000, McVicker determined that escalators could be delivered to the jobsite, and notified Custer of that fact. McVicker decided upon the number of employees to work at the site. He concluded that two teams were necessary to unload the escalators and bring them into the building. A team is composed of a mechanic and an apprentice. McVicker and his apprentice constituted one team, and he asked Custer to assign one additional team. McVicker was not involved in the hire of the employees.

Upon the arrival of the three other employees at the site, McVicker called a meeting and the men agreed that their work hours would be 7:00 a.m. to 2:30 p.m., instead of 8:00 a.m. to 3:30 p.m., the regular hours provided in the collective-bargaining agreement. The employees record their hours and give the time sheets to McVicker, who checks them, approves them and submits them to Custer. McVicker assigned overtime to the workers the first day they worked, without asking Jenkins or Custer whether he could assign such overtime.

McVicker assigned work to the employees on a daily basis. Such assignments included unloading equipment, hanging safety equipment, removing safety lines, backing the trucks into position; and setting up and positioning the cranes. He stated that the collective-bargaining agreement requires that certain parts of the escalators be removed and re-installed. If the workers had any questions concerning the method of installation they would ask him.

There were three days of work consisting of unloading and installing the escalators at the Secaucus jobsite. All the witnesses agreed that the first day of work was on Thursday, October 12. There is a disagreement as to the dates of the second and third days of work. Although there was some discrepancy in McVicker's testimony, I agree with his version that the second and third days of work were on Friday, October 13, and Monday, October 16. I do this because (a) McVicker testified several times to those dates (b) his testimony about the third day, October 16, agrees with Custer's testimony (c) Respondent's charge against McVicker states that the third day was October 16 and (d) all witnesses agree that the Respondent's business agent Raymond Hernandez visited the jobsite on the second day of work.

The actual dates the work was performed are not critical. All witnesses essentially agree as to what happened and the sequence in which the events occurred. Thus, on the second day of work Hernandez spoke with McVicker, and that on the final day of work a confrontation took place between Custer and two employees. For the purposes of the following recitation of the facts, I will use McVicker's version of the dates these events occurred.

Six escalator sections arrived by truck at the worksite on Thursday, October 12, 2000. The work of unloading them began that day. Each section weighs more than 10,000 pounds and is about 33 feet long. The work included moving the equipment across the building. When the escalators arrived at the site, McVicker realized that four employees were too few to complete the task. He asked Custer to send more workers. Custer assigned two additional men but they were refused entry to the site by Amtrak personnel because they were not trained in Amtrak's safety procedures. McVicker testified that the unloading proceeded with four employees. He stated that he assigned the following work to the employees: assist in unloading the equipment, hang the safety equipment, remove the safety lines, back the tractor trailers into position, and set up and position the cranes.

McVicker testified that that evening he phoned Custer and asked for one additional employee to help them.

In their written statement to the International Union and Respondent, employees Kenny Kolodziej and Thomas Weber stated that the work was done that day with six employees, or three teams, but it appears that those six employees actually worked on the next workday—Friday, October 13.

McVicker testified that on Friday, October 13, the second day of unloading the escalators, the work was done with six

employees, including two extra men sent by Custer at McVicker's request.[2]

Respondent's business agent Raymond Hernandez testified that he received a call from Respondent's day secretary Joe Nolan who told him that there was a "problem" at the jobsite concerning the unloading of escalators which related to Article 4 of the collective-bargaining agreement. Hernandez immediately visited the jobsite and asked McVicker how many employees would be working at the site. McVicker replied that he intended to do the installation with six workers. Hernandez seemed surprised that the work could be done with such few people but McVicker assured him that since the job was expected to take two or more years, the smaller number of employees would be employed a longer period of time. McVicker stated that the employees told Hernandez that they demanded that more employees be employed on the job. Hernandez told McVicker that more workers should be hired. McVicker replied that he would always have enough people on the job to safely perform the work. In their written statement, the employees noted that five men were at work that day. Kolodziej testified that he believed that the job could be done with five employees if adverse conditions such as strong wind, were not present.

During his visit, Hernandez gave McVicker a document which set forth the "jurisdictional paperwork" concerning which escalator parts had to be removed by the workers pursuant to the collective-bargaining agreement. Hernandez made the further request that prior to the installation of the glass escalator sections, the glass brackets had to be removed. McVicker posted the paper in the trailer for the employees to see.

McVicker stated that the next workday, Monday, October 16, Custer and Jenkins were present to attend a job meeting, which McVicker was unable to go to because of the escalator unloading. McVicker and three other men worked at the jobsite. McVicker assigned Kolodziej and Weber to the second floor, and he and Robert McVicker, his son, worked on the ground floor. Kevin Zelinsky was supposed to work that day but did not appear.

Kolodziej became concerned that with only four employees the job could not be done safely. He stated that without Zelinsky the crew was short one man. He came to the first floor and told McVicker that there was a problem with "manpower," and suggest that McVicker "do something about it." McVicker replied that they would "see what happens" and directed him to set up the crane and go to the second floor and get ready to do the job—then they would see if Zelinsky appeared. After working in this manner and upon the arrival of a second truck, Kolodziej noticed that Zelinsky had still not appeared and "now we have a serious problem arising." Kolodziej and his partner Weber stopped work and approached McVicker to "confront" him regarding the absence of Zelinsky.

McVicker told Kolodziej to speak to Custer about their concern. Kolodziej testified that Custer asked him why he left his work area on the second floor. Kolodziej replied that he needed an extra worker on that floor, and that it was unsafe to unload the sections with only four employees. Custer responded that the workforce was short one employee since Zelinsky, who was assigned to work, did not appear. It was suggested that Custer direct the crane from the second floor, thereby substituting for Zelinsky.[3] Kolodziej objected that Custer could not perform unit work since he was not a member of the Respondent. Custer replied that he would pay Zelinsky for the day even though he was absent. Kolodziej repeated that Custer could not perform unit work.

Custer then asked Kolodziej if he was refusing to unload the equipment. Kolodziej replied that he was not actually refusing to do the work. Kolodziej testified that he told Custer that he was refusing to do an unsafe job. Custer responded that if he was refusing to work he could report to the union hall as he was fired. Weber then interjected that if Kolodziej was returning to the union hall he would do the same.

At that point McVicker entered the conversation since he found that the discussion had gone from being "friendly" to "a little bit quarrelsome." McVicker said that there was no reason for anyone to be fired. McVicker suggested a way to resolve the matter—the crane would lift the load off the truck and hold it in mid-air while McVicker went to the second floor before the load was brought into the building and he would be the additional worker. Custer made another suggestion and ultimately both suggestions were implemented with McVicker working on the second floor and Custer performing no work. The work was completed upon the arrival and assistance of apprentice Greg O'Loughlin who was requested by Custer to report to the jobsite from Newark Airport. No one was discharged.

Kolodziej testified that when he was arguing with Custer, McVicker stood off to the side and did not intervene.

That day was the last day worked by the Employer on the job site for two weeks due to delays in receiving equipment. In the interim, McVicker completed paperwork at Secaucus, and was then reassigned to another jobsite. The Secaucus job resumed in late October or early November with a delivery of more escalators. McVicker worked on the site with four other employees but did not act as the mechanic in charge during such work, which lasted four days.

C. The Respondent's Proceedings Against McVicker

McVicker received a summons to appear on November 8 before Respondent's Executive Board. McVicker stated that at that meeting, he told John Green, Respondent's president, that he was the mechanic in charge at the Secaucus jobsite. Green examined McVicker's union card which bore no mention that he was the mechanic in charge, and told him that he could work at the jobsite but could no longer "run" that job. According to McVicker, Green did not offer an explanation. At the meeting, McVicker was questioned extensively about what had occurred on October 16, and Green told him that charges might be brought against him. The following day, McVicker told Custer

[2] I do not credit the testimony of Kolodziej and Weber that on that Friday no unloading took place because the crane was in use elsewhere. McVicker testified that he believed that the second day of unloading was October 13 or 15. However, October 15 was a Sunday when no work took place.

[3] McVicker first testified that he made the suggestion, and later stated that Custer did so.

and Jenkins that Green had "unilaterally removed" him from the position of mechanic in charge at the jobsite.

Anthony Orrigo, Respondent's secretary-treasurer, testified here that inasmuch as McVicker's union card did not say that he was a mechanic in charge he could not be "accepted" as such, and was not considered as a mechanic in charge, especially in light of the safety complaint made against him, which was subject to further investigation. Orrigo stated that there had been safety concerns with the Employer and its predecessor Curtis in the past, and that members of Respondent had died in accidents on jobsites between 1996 and 1999.

On January 7, 2001, Kolodziej and Weber made a written complaint to Respondent concerning McVicker's actions. They related what occurred at the jobsite which essentially is the same as McVicker's version set forth above. Their specific complaints were that McVicker "ignored the safety issues discussed with Hernandez" prior to the October 16 incident, and "set [the employees] up for a confrontation with Custer," and also failed to intervene with Custer in their behalf.

Shortly thereafter, McVicker received charges from Respondent, filed by business agent Hernandez. The charge alleged a violation of the following provision of the Respondent's constitution and by-laws:

> Section 19. Any member to receive over the mechanic's wage shall be referred to as "Mechanic in Charge."
> D. He shall be instructed by the Executive Board to report immediately to the union the following:
> 3. Any Brother who performs his work hazardous to other Brothers on said job.

The specific violation alleged that on October 16, McVicker "expos[ed] members to hazardous working conditions while overseeing the unloading of escalators from the unloading site to a second story final destination. Due to extreme equipment pull off stress, those in the performance of their duties requested more manpower to safely unload material (escalator truss). Request for additional manpower was refused and threat that those asking for it would be fired if they did not carry out the job assignment. Brother McVicker was instructed by Brother Hernandez to provide more personnel to accomplish this assignment one-day prior to incident. Brother McVicker, acting as mechanic in charge refused to comply with the directive and allowed three workers to attempt to perform the job assignment."

Hernandez testified that he filed the charges because during his conversation with McVicker on October 13, McVicker "proclaimed himself" the mechanic in charge and accepted the responsibility of running the job in a safe manner. Hernandez believed that McVicker violated his agreement with him to have six employees working on the site, when on October 16, only four were employed. McVicker therefore was held responsible for "putting four employees in jeopardy."

A trial on the charges took place on February 6, 2001. According to the minutes of the hearing, Hernandez related that he directed McVicker on October 15 to have six workers employed on the site in order to safely perform the work. According to the minutes, McVicker agreed that five workers were necessary to perform the job but that on October 16 only four were employed because one employee failed to appear, and nevertheless, the job was performed safely.

On March 9, Respondent sent a letter to McVicker. The letter stated that its Executive Board found him guilty of both charges. He was fined $2,000 for each charge, with $1,000 for each charge to be paid immediately, and $1,000 for each charge held in abeyance "pending any future violations of the Constitution." Further, he was prohibited from working as a mechanic in charge for one year from the date of the letter.

McVicker reported to the Employer that Respondent prohibited him from working as a mechanic in charge. He was told that the Employer did not want to "ruffle feathers" concerning Respondent and that they should take a "wait and see" attitude.

The Respondent's by-laws requires that a member must report to the union the fact that he was appointed as mechanic in charge, after which the Executive Board explains to him the working conditions associated with such position. Upon his acceptance of those conditions, his union card is stamped "mechanic in charge." According to the minutes of the hearing, McVicker admitted that he did not inform the Respondent that he had been appointed as mechanic in charge at the Secaucus jobsite, but at the NLRB hearing, he stated that he telephoned the Respondent and informed it that he had been so assigned.

McVicker appealed the charges and the verdict to the Union's International General Executive Board. On December 6, 2001, the General Executive Board notified McVicker that "in view of the pending unfair labor practice hearing" before the National Labor Relations Board regarding the Respondent's charges, the appeal was tabled until the next General Executive Board meeting.

No grievance was filed against the Employer concerning the allegations of unsafe working conditions.

D. McVicker's Duties

The collective-bargaining agreement, Section IV(J)—"Mechanic in Charge (Foreman) of Job" provides that:

> Under the direction of a Superintendent the mechanic in charge shall have the right to assign and schedule work, direct the work force and to enforce the safety practices and procedures on the job to which he is assigned by the Employer.

The contract also states that when four persons including the elevator constructor mechanic in charge, are employed on a new construction job, one shall be designated as the elevator constructor mechanic in charge of the job and shall have his hourly rate increased by 12.5% for all hours actually worked.

As set forth above, McVicker decided when employees should be assigned to work at the project and how many were needed. He assigned work to the employees on a daily basis. He has no authority to hire, discharge or promote employees, and in his pre-trial affidavit he stated that he does not have the authority to discipline employees, explaining that he believed that the question related to more severe forms of discipline, such as discharge.[4] However, McVicker testified about his discipline of employee Kevin Zelinsky. He stated that in November, he

[4] McVicker at first denied that his affidavit contained the statement that he did not have authority to discipline employees, but when shown the affidavit admitted that it did say that.

told employee Zelinsky to wear his safety eyeglasses. Thereafter, an OSHA inspector observed Zelinsky without eyewear, and directed McVicker to have Zelinsky wear the eyeglasses. Zelinsky put them on but then removed them. The inspector returned, saw that Zelinsky was not wearing his eyeglasses and warned McVicker that unless Zelinsky wore his eyeglasses he would shut the site down and have the Employer removed from the site. McVicker then told Zelinsky that he must wear his eyeglasses or go home because McVicker could not afford to have the jobsite shut down. Zelinsky then put on the eyeglasses.

McVicker stated that he is the person to whom the Amtrak inspectors go to if employees are not following safety regulations, as set forth above. He is also responsible to ensure that employees follow the safety regulations of OSHA and Amtrak. McVicker stated that if the employees had any questions concerning their work they would ask him.

Regarding his terms and conditions of employment, McVicker was paid at the contractual mechanic in charge rate, which was 12.5 percent above the mechanic's rate, and also was provided a paid automobile. He was paid at a double-time rate when he worked overtime and contributions were made to Respondent's funds on his behalf by the Employer and other employers for which he worked. Employer official Custer testified that Kone employs about 200 elevator mechanics and apprentices, which includes 46 who work in the construction department—the division of the business in which McVicker was always employed. Of those 46 employees, seven worked as mechanics in charge. Custer stated that it is common for employers to pay a premium rate to mechanics if they are competent and the employer wishes to retain the employee. Custer is a salaried employee who is not covered by the collective-bargaining agreement, no contributions to Respondent's funds are made for him and he does not receive pay for overtime work.

Kolodziej testified that he did not consider McVicker or any mechanic in charge to be his supervisor. He stated that the mechanic in charge "delegates" the work to be done, obtains the equipment to perform the work and gives material to the workers. Kolodziej and Weber testified that they regarded Custer and Jenkins as their supervisors, and they would file any grievance they had with those two individuals. Following the close of the Secaucus job on October 16, Kolodziej was told by McVicker to call Custer for his next assignment.

McVicker did not participate in any meetings, discussions, or conferences in the negotiation of the current collective-bargaining agreement. Counsel for the General Counsel conceded that McVicker is not involved in negotiations for collective-bargaining agreements, or in the formal grievance procedure.

Respondent's business agent Hernandez and its secretary treasurer Anthony Orrigo testified that mechanics in charge are not generally considered to be supervisors. Grievances are filed with an employer's supervisor or office manager, but never with the mechanic in charge.

III. ANALYSIS AND DISCUSSION

A. The Supervisory Status of McVicker

According to Section 2(11) of the Act:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is phrased in the disjunctive. The exercise of authority requiring independent judgment with respect to any one of the actions specified is sufficient to confer statutory supervisory status. *Queen Mary*, 317 NLRB 1303 (1995).

McVicker was the Employer's sole representative at the Secaucus jobsite. The only time that his supervisor, Custer, appeared at the site was on the date of the confrontation concerning the need for additional workers. McVicker was in charge of the Employer's day-to-day operations.

The evidence establishes that McVicker initially decided upon the number of employees needed to perform the work when the Employer's work on the project began. He communicated that to his supervisor and the employees were hired. McVicker assigned employees to their work duties, and directed the complex and dangerous work of unloading enormous escalator sections from trucks and their installation into the second floor of the Secaucus facility. He determined how many employees would be needed to perform various tasks during the progress of the work itself and recommended to Custer that additional workers be hired as needed. On the first day of work, McVicker initiated a meeting of employees to discuss their work hours and obtained an agreement from them which differed from the collective-bargaining agreement in that regard. McVicker decided that employees should work overtime and assigned such overtime work. He also recorded the employees' work hours. McVicker issued a verbal warning to Zelinski and threatened to dismiss him if he did not wear his safety glasses. In addition, he represented the Employer at contractor meetings at the jobsite. McVicker checked and approved the time sheets submitted to him by the employees and sent them to the Employer for payment.

The employees brought safety issues to McVicker's attention for resolution. When employee Kolodziej complained that more workers were needed, McVicker directed him to proceed with the preparatory work and said that he (McVicker) would decide what action to take based upon whether Zelinski reported to work.

McVicker used independent judgment in the exercise of virtually all of the above duties. Thus, he independently decided when the job was ready to receive a crew, he decided how many employees were needed initially and during the progress of the work, he assigned the workers to, and directed them in the intricate unloading and installation of extremely heavy and cumbersome equipment. As the only Employer representative on the jobsite responsible for a crew of workers, it is clear that

the exercise of these responsibilities was not the product of routine direction but was done with the use of extensive independent judgment. This is particularly illustrated by the fact that prior to the beginning of the physical work, McVicker spent four months creating required detailed work plans for the unloading and installation of the escalators. The involved nature of this preparatory work, which was approved by an engineer, serves to emphasize that in the actual performance of the work extensive independent judgment was utilized.

McVicker exercised many of the responsibilities performed by the mechanic in charge, found to be a statutory supervisor, in *Elevator Constructors Local 36 (Montgomery Elevator)*, 305 NLRB 53, 54–55 (1991).

Respondent argues that McVicker was not a statutory supervisor based upon the collective-bargaining agreement which states that "under the direction of a superintendent the mechanic in charge shall have the right to assign and schedule work, direct the work force . . . ." Respondent contends that McVicker can exercise no independent judgment since he performs his duties only under the direction of a superintendent. However, superintendent Custer was not on the jobsite except on the last day of work, and McVicker exercised his responsibilities in directing the work without supervision. Respondent further asserts that since McVicker was covered by the collective-bargaining agreement and was a member of the unit he was not a supervisor. These cases arise because of the union's discipline of a supervisor-member who is by necessity a unit member. In *NLRB v. Electrical Workers Local 340 (Royal Electric*), 481 U.S. 573, 595, the Supreme Court stated that the union member—particularly a supervisor—has "a right to resign from a union at any time and avoid imposition of union discipline."

I accordingly find and conclude that McVicker is a supervisor within the meaning of Section 2(11) of the Act.

B. The Alleged Violation of the Act

The complaint alleges that Respondent unlawfully imposed a monetary fine on McVicker because he (a) refused Respondent's October 15, 2000 demand that the Employer utilize additional employees to unload an escalator truss at the Secaucus Project, and (b) decided on October 16, 2000, to unload the truss without Respondent's consent.

Section 8(b)(1)(B) of the Act provides that it is an unfair labor practice for a union to "restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

The Supreme Court has held that:

> A union's discipline of one of its members who is a supervisory employee can constitute a violation of Section 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer. *Florida Power and Light Co. v. Local 641, IBEW*, 417 U.S. 790, 804–805 (1974).

In those circumstances, "the employer would be deprived of the full service of his representatives and hence would be restrained and coerced in his selection of those representatives." *American Broadcasting Co. v. Writers Guild*, 417 U.S. 411, 429 (1978).

McVicker was the only Employer representative available on a day-to-day basis to deal with employee grievances and problems. His duties were similar to those of the supervisor found to be engaging in Section 8(b)(1)(B) grievance-adjusting functions in *Steelworkers Local 1013 (USX Corp.)*, 301 NLRB 1207, 1209 (1991). Such employee problems included ensuring the accuracy of payments, job assignments, calling in workers or requiring overtime, ensuring that employees did not work in unsafe conditions, and relieving an employee from work for the remainder of the shift for alleged misconduct. McVicker's duties involved these matters. If they were the subject of a grievance as was the issue of safety, McVicker, as the Employer's representative at the jobsite, had the authority to resolve them. Thus, Kolodziej asked McVicker to do something about the fact that they needed an extra worker so that the job could be performed safely.

Similarly, Respondent's agent Hernandez spoke to McVicker concerning an employee complaint concerning the unloading of the escalators and safety issues. Accordingly, McVicker dealt with the Respondent concerning employee grievances. During their meeting, the employees and Hernandez demanded that more workers be hired. McVicker assured Hernandez that the number he assigned was sufficient and that he would always ensure that enough employees were employed to do the job safely. Thus, McVicker dealt with Respondent's representative, and also resolved grievances, if only at a "fairly low level." It is clear that the Employer vested McVicker with the "authority and responsibility to settle jobsite problems, and that [he] was the only person whom [the Employer] had available to represent it in day-to-day dealings" with Respondent's agents. *Sheet Metal Workers Local 68 (DeMoss)*, 298 NLRB 1000, 1004 (1990).

In that case, the Board found that superintendents who were the only persons representing the employer on the jobsite and who were the only persons with the authority and responsibility to settle jobsite problems, possessed the authority to represent the employer in the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act. *DeMoss*, above, at 1004.

The Respondent argues that McVicker was not involved in grievance adjustment. It asserts that McVicker engaged, at most, in the "resolution of daily supervisory problems or the resolution of routine personal problems that do not rise to the level of grievance adjustment necessary to confer 8(b)(1)(B) status on an employer's representative." *Elevator Constructors (Montgomery Kone, Inc.)*, JD–113–96; *Hod Carriers Local 872 (Andrew T. Curd Builders)*, 310 NLRB 488, 492–493 (1993). However, in *Hod Carriers*, the Board stated that it found it unnecessary to pass on the judge's conclusion that the foreman did not possess grievance-adjustment responsibilities necessary to establish his states as an 8(b)(1)(B) representative, but based its decision only on the fact that the foreman's termination did not result from union coercion. *Hod Carriers*, above, 310 NLRB 488 at fn. 1. Here, however, McVicker was involved in genuine grievance adjustment and resolved Respondent's and the employees' concern about manning requirements during the meeting with Hernandez.

Respondent is correct in asserting that Custer took control of the confrontation with Kolodziej. However, that fact does not diminish McVicker's authority. Rather, it appears that Custer took charge of the situation because he was at the jobsite. McVicker properly deferred to his supervisor when Custer was present. Custer did not come to the jobsite in order to direct the work. The work was in progress when he arrived. Custer and Jenkins were present for the purpose of attending a job meeting which McVicker could not attend because he was directing the installation of the escalator sections.

I also find that McVicker was involved in contract interpretation. First, he was responsible to ensure that the work was done according to the collective-bargaining agreement's standards. He testified that the agreement specified what work the employees represented by Respondent must do. In addition, the contract provides that as a mechanic in charge he was responsible to "enforce the safety practices and procedures on the job…." The specific violation charged by Respondent was that he exposed the workers to hazardous working conditions. Hernandez stated that his reason for filing the charges was that McVicker "proclaimed" himself the mechanic in charge and, as such, was responsible for the safety of the employees. Accordingly, McVicker interpreted the contract as permitting his assignment of a certain number of workers which he believed could safely unload and install the escalators. Respondent disagreed with his interpretation and fined him because he refused Hernandez' demand that more workers be assigned, and that because fewer workers were assigned, those performing the work were subject to dangerous working conditions. I therefore find that Respondent brought charges against McVicker because of his interpretation of the contract. *Sheet Metal Workers Local 104 (Simpson Sheet Metal)*, 311 NLRB 758, 759 (1993).

Respondent argues that McVicker was not involved in contract interpretation. Rather, the Respondent and its members have an overriding concern with safety issues on the job, and thus raised that matter with him in an attempt to ensure their safety when moving the escalator sections. I share Respondent's interest in promoting safe working conditions. However, the core issue here is the fact that McVicker set the number of employees needed to perform the work and the Respondent objected to that number and imposed discipline upon him for doing so.

In *Sheet Metal Workers Local 68 (DeMoss)*, 298 NLRB 1000, 1003 (1990), the Board stated that:

> An important interest that Congress was protecting in Section 8(b)(1)(B) was an employer's interest in having an individual of its own choosing to represent it in dealing with the union that represents its employees. The employer's need for uncoerced representation of its interests is of great importance at the level at which grievances first arise, since the employer's preferred interpretation of the contract could be effectively thwarted by a jobsite representative who "resolved" grievances simply by agreeing to whatever the union's job steward proposed.

The fines were imposed upon McVicker because of his interpretation of the contract in a manner which was contrary to Respondent' interpretation. In *Montgomery Elevator*, above, the respondent was found to have improperly fined the mechanic in charge because of his method of interpreting the contract relating to the hoisting of material. The coercion exerted by Respondent by imposing the fines and prohibiting from working as a mechanic in charge for one year served to penalize McVicker for his actions while serving as the Employer's Section 8(b)(1)(B) representative.

I find that the fines imposed upon McVicker would likely have an inhibiting effect on his future conduct as a supervisor, a company representative, and a grievance adjuster. *Dallas Mailers Local 143 (Dow Jones Co.)*, 181 NLRB 286 (1970). McVicker was fined because of the action he took as a supervisor—the assignment of four employees to move an escalator section into the building. Respondent's imposition of a fine upon McVicker because he exercised his supervisory and Section 8(b)(1)(B) duties would necessarily have an adverse effect upon his future performance of his responsibilities as a management representative and as a grievance adjuster.

In making future decisions on staffing, McVicker would be motivated not solely by the Employer's interests, but by the actions the Respondent may take against him. This possibility presents an actual concern since this job was expected to last at least two years and during the course of that work McVicker would have to make manning decisions frequently. Such intimidation would therefore deprive the Employer of McVicker's full and unimpaired service and therefore restrain the Employer in the selection of its representatives. *ABC*, above, at 429.

In addition, the Respondent's removal of McVicker from his position as mechanic in charge deprived the Employer of having McVicker as its mechanic in charge at its jobsites.

CONCLUSIONS OF LAW

1. Kone, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondent, Local One, International Union of Elevator Constructors of New York and New Jersey, is a labor organization within the meaning of Section 2(5) of the Act.

3. By imposing a monetary fine on Peter McVicker by letter of March 9, 2001, because McVicker refused Respondent's October 13, 2000 demand that the Employer utilize additional employees to unload escalator trusses at the Secaucus project, and because of McVicker's decision on October 16, 2000, to unload the escalator truss without acceding to Respondent's demand, Respondent violated Section 8(b)(1)(B) of the Act.

4. By prohibiting Peter McVicker from working as a mechanic in charge for one year from March 9, 2001 because of the reasons set forth above, Respondent violated Section 8(b)(1)(B) of the Act.

REMEDY

Having found that Respondent violated Section 8(b)(1)(B) of the Act by imposing a monetary fine on Peter McVicker, it is recommended that it cease and desist therefrom and take certain affirmative actions necessary to effectuate the policies of the Act, including rescission of the fine, the removal of all references in its files thereto, refund of any moneys paid as a result of the unlawful fine imposed upon McVicker, and written noti-

fication to McVicker and to the Employer that this has been done and that no further action will be taken against him as a result of the charges filed by Raymond Hernandez against McVicker, and that an appropriate notice be posted.

Any fines paid by McVicker shall be refunded by Respondent and shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It is also recommended that Respondent rescind its prohibition upon McVicker that he not work as a mechanic in charge for one year from March 9, 2001, and make written notification to McVicker and to the Employer that this has been done.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Local One, International Union of Elevator Constructors of New York and New Jersey, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining or coercing Kone, Inc., in the selection of representatives for the purpose of adjustment of grievances by imposing monetary fines upon individuals because of their role in the adjustment of grievances on behalf of Kone, Inc., and by prohibiting them from working as a mechanic in charge.

(b) In any like or related manner restraining or coercing any employer in the selection of representatives for the purpose of the adjustment of grievances.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the fine imposed upon Peter McVicker because of the charges filed by Raymond Hernandez and refund to him any moneys paid as a result of such fine, with interest, as provided in the Remedy section.

(b) Rescind the prohibition upon Peter McVicker that he not work as a mechanic in charge for one year from March 9, 2001.

(c) Within 14 days from the date of this Order, rescind the internal union charges and the fine levied upon Peter McVicker and remove from its files all references to the charges and the fine and the prohibition from working as a mechanic in charge against Peter McVicker, and within 3 days thereafter notify Peter McVicker and the Employer in writing that this has been done and that no further action with be taken against him as a result of the charges filed against him or because of his role as an employer representative for the adjustment of grievances.

(d) Within 14 days after service by the Region, post at its union office in Long Island City, New York, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by Kone, Inc., if willing at all places where notices to employees are customarily posted.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT restrain or coerce Kone, Inc., in the selection of representatives for the purpose of adjustment of grievances by filing internal union charges against, levy fines against, or by prohibiting employees from working as a mechanic in charge, because of their role in the adjustment of grievances on behalf of Kone, Inc.

WE WILL NOT in any like or related manner restrain or coerce any employer in the selection of representatives for the purpose of the adjustment of grievances.

WE WILL rescind the fine imposed upon Peter McVicker because of the charges filed by Raymond Hernandez and refund to him any moneys paid as a result of such fine, with interest.

WE WILL rescind the prohibition upon Peter McVicker that he not work as a mechanic in charge for one year from March 9, 2001.

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[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL within 14 days from the date of this Order, rescind the internal union charges and the fine levied upon Peter McVicker and remove all references to the charges and the fine and the prohibition from working as a mechanic in charge against Peter McVicker from its files, and within 3 days thereafter notify Peter McVicker and the Employer in writing that this has been done and that no further action with be taken against him as a result of the charges filed against him or because of his role as an employer representative for the adjustment of grievances.

LOCAL ONE, INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS OF NEW YORK AND NEW JERSEY